IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

F.A.O. No. 242 of 2002

Judgment reserved on:5.4.2006

Date of decision: 16.05.2006

Smt. Durgi Devi Appellant

Versus

Param Dev and others Respondents

Coram:

The Hon'ble Mr. Justice Deepak Gupta, J.

Whether approved for reporting ? NO

For the appellant(s):Mr.Rajnish Maniktala,Advocate

For the respondent(s): Mr.M.S.Guleria,Advocate

Deepak Gupta,J.

The present appeal under Order 43 Rule 1 C.P.C. is directed against the judgment of the learned District Judge, Mandi in Civil Appeal No. 129/1999 whereby the appeal of the appellant has been allowed and the matter has been remanded to the learned trial court.

Briefly stated the facts of the case are that the present appellant alongwith one Smt. Devku (whose name stands deleted) had filed a suit against the respondents and their predecessor-in-interest. In the suit it was alleged that the revenue entries showing the suit property in the ownership and joint possession of the plaintiffs and their mother Maltu to the extent of ½ share with one Bhadri and widow of late Narotam as owner of

the other ½ share are incorrect. According to the plaintiffs their grand father Kalia was in sole possession of the suit property and he was succeeded by Narotam Magu and Hukami. All these three have died. Magu was the father of the plaintiffs and according to the plaintiff he was in exclusive possession of the suit property including the shares of Hukami and Narotam. Further, according to the plaintiff, Narotam, after the death of his first wife had kept Bhadri as a concubine. According to the plaintiffs Bhadri was in fact wife of Devi Ram and the original defendants were stated to be the children of Bhadri from the loins of Devi Ram. Narotam died on 22.2.1974. According to the plaintiff the share of Narotam was wrongly mutated in the name of Bhadri as his wife. In the alternative the plaintiff claimed to have become owner by way of adverse possession.

The defendants raised various objections. They pleaded that Bhadri was in fact wife of Narotam and according to them the mutation in her favour was rightly attested. They also claimed that previously also a suit had been filed by the plaintiffs and their mother which had been dismissed. The trial court on the pleading of the parties framed the following issues:-

1. Whether the entries in the records of right describing Bhadri to be the co-owner are wrong and the plaintiff is exclusive owners of the suit land, as alleged ? If so, its effect ? OPP

2. Whether the plaintiffs have become owners by way of adverse possession, as alleged ? OPP
3. Whether the suit is barred by limitation as alleged ? OPD
4. Whether the plaintiff has got no cause of action ? OPD
5. Whether the suit is barred under the provisions of Order 2 Rule 2 CPC, as alleged ? OPD
6. Whether the suit is barred by principle of res-judicata OPD
7. Relief

The trial court decided issues No. 1 to 4 against the plaintiffs and in favour of the defendants and dismissed the suit.

It would be pertinent to mention at this stage itself that the trial court while giving its findings in para 13 of the judgment observed as follows:-

"13. Firstly in order to prove whether Smt. Bhadri was legally wedded wife of Narotam, I have gone through the documents Ex.D1, Ex.D2 and Ex.D3. Perusal of the aforesaid documents shows that after the death of Narotam his entire pension and gratuity was sanctioned in favour of Smt. Bhadri being his legally wedded wife. The aforesaid documents have clearly mentioned the name of Bhadri as legally wedded wife of Sh. Narotam. Apart from this, there are other two documents, one is mutual divorce between Devi Ram and Smt. Bhadri dated 16.2.1957 and marriage deed between Smt. Bhadri and Sh. Narotam dated 19.3.1997. Although the aforesaid documents have not been exhibited and placed on record. However, both these documents are essential in order to determine the fact regarding marriage between Smt. Bhadri and Narotam."

The learned lower appellate court held that the documents Ex.D-1 to Ex.D-3 have simply been tendered in evidence and had not been properly proved and, therefore, could not have been read in evidence. It further held, and rightly so, that the documents which had not been marked and proved in accordance with law could not have been read in evidence. It, however, further came to the conclusion that these documents were very relevant and since they were admitted in evidence without any objection from the plaintiffs, the defendants should be given an opportunity to prove these documents by filing proper application. The case was accordingly remanded. The plaintiff aggrieved against the said order of remand has filed the present appeal.

Mr.Rajnish Maniktala, learned counsel for the plaintiff-appellant, submits that the learned lower appellate court has gravely erred in remanding the case. According to him once the court held that the documents have not been proved in accordance with law, the case should not have been remanded back and the suit should have been decreed. . By doing so, an opportunity has been given to the defendants to fill in the lacuna in their case. On the other hand Mr.M.S.Guleria, Advocate, submits that the documents had been admitted to evidence without objection by the plaintiff and further he submits that in fact after remand

of the case the entire evidence has been led and all the disputed documents have been produced and proved in accordance with law. By the time the plaintiff obtained the stay order from this court the evidence had been concluded and the case was only listed for arguments.

Mr.Maniktala has relied upon the judgment of the apex court in **P.Purushottam Reddy and another Vs. Pratap Steels Ltd.** (**2002) 2 SCC 686** and contends that the matter could not have been remanded because the remand order is not covered under any of the provisions of Order 41 Rule 23 to Order 41 Rule 25 CPC. He also relied upon the judgments reported in **Chhatar Mahto and others Vs. Chito Mahto and others 1967 Patna 378; Halayudh and another Vs. Tek Chand and others AIR 1953 HP 85 and Kalika Pande Vs. Ram Autar Pande and another AIR 1938 Allahabad 621.** On the other hand Mr. Guleria has relied upon the judgment of the apex court in **Dayamathi Bai (Smt.) Vs. K.M.Shaffi (2004) 7 SCC 107.**

In my opinion in the peculiar facts and circumstances of the case it may not be necessary to refer to all the aforesaid judgments. The facts which are not in dispute are that the documents in dispute or copies thereof had been filed on record. Three of the documents were exhibited as Ex.D-1 to E-3 without any objection from the plaintiff. Photo copies of two

documents were already on record. It is, no doubt, true that they were neither exhibited nor proved in accordance with law. However, this is not a case of filling up the lacuna since these documents were already on record and there is no question of taking the plaintiff by surprise. All these documents are necessary for the decision of issue No.1. Further more, after the remand in the present case all these documents have now been proved and exhibited. At this stage it would not be appropriate to discard this evidence which has been proved on record. No fault can be found with the conclusion of the learned lower appellate court that the documents are necessary to decide the issue and that an opportunity should be given to the defendant to prove these documents by filing appropriate application and leading appropriate evidence. The rules of procedure are only handmaiden to achieve the ends of justice. Technicalities should not come in the way of search for truth.

Therefore, in my opinion, there is no merit in this appeal which is accordingly dismissed with no order as to costs. The parties through their counsel are directed to appear before the trial court on 19th June, 2006, who shall dispose of the main suit within three months.

May 16, 2006(K) (Deepak Gupta), Judge